No. 16409

IN THE

United States Court of Appeals

For the Ninth Circuit

MYRON E. McPHERSON,

Appellant,

vs.

AMALGAMATED SUGAR COMPANY,
a corporation,

Appellee.

BRIEF OF APPELLEE

Appeal from the United States District Court for the District of Idaho, Southern Division

HONORABLE FRED M. TAYLOR, JUDGE

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JURISDICTION

The District Court had jurisdiction under 28 U.S.C.A. 1332, there being a diversity of citizenship (T.R. 3-4) and the amount in controversy, exclusive of interest and costs exceeding $10,000.00. (T.R. 4).

This court has jurisidiction to hear this appeal under 28 U.S.C.A. 1291, 2107 and Federal Rules of Civil Procedure, Rule 73.

STATEMENT OF CASE

A. PRIOR COURT ACTION AND SATISFACTION OF JUDGMENT.

Prior to the filing of the present action, the same plaintiff on May 13, 1957, filed in the District Court for the District of Idaho a complaint in Case No.

3341, naming the Union Pacific Railroad Company as defendant (T.R. 10-14), and in that action this same plaintiff alleged that he was an employee of the Union Pacific Railroad Company, employed at Gooding, Idaho, and that on November 13, 1956, a freight car loaded with beets was set in motion by means of a pinch bar and being operated by an agent of defendant, Union Pacific Railroad Company (T. R. 11), was driven into, upon and against the plaintiff. Plaintiff asked for damages in the sum of $375,000.00.

The defendant, Union Pacific Railroad Company, answered in Case No. 3341 (T.R. 15-17), putting into issue the allegations of plaintiff's complaint, and thereafter Case No. 3341 proceeded to trial, before a jury, and on September 14, 1957, the verdict of the jury was returned, assessing damages against the defendant, Union Pacific Railroad Company, in favor of plaintiff, in the sum of $35,600 (T.R. 18-19), and judgment was entered in the District Court for that amount (T.R. 19-20).

On March 25, 1958, there was filed in the District Court a satisfaction of judgment in Case No. 3341, showing payment and satisfaction to plaintiff in the sum of $35,600.00, together with $313.80 court costs and $546.70 interest, and the plaintiff, Myron E. McPherson, duly acknowledged satisfaction of said judgment which provided that "satisfaction of said judgment is now hereby acknowledged, and the clerk of said court is hereby authorized and directed to

enter of record, satisfaction of said judgment." (T. R. 21)

B. PRESENT ACTION

On November 12, 1958, the complaint in the present action was filed in the same District Court for Idaho, as case No. 3490, by the same plaintiff, Myron E. McPherson, naming the Amalgamated Sugar Company as defendant (T.R. 3-7). The plaintiff in this action alleged that on November 13, 1956 the plaintiff was an employee of Union Pacific Railroad Company, working in the railroad yard at Gooding, Idaho. That on that date a freight car loaded with beets was set in motion by means of a pinch bar and being operated by an agent of defendant, Amalgamated Sugar Company was driven into and against the plaintiff (T.R. 4). Plaintiff asked damages in the sum of $338,000.00 (T.R. 6).

To the above-mentioned complaint in this action defendant filed a motion to dismiss under Rule 12 (b) (6) and by the motion the prior action, case No. 3341, against the Union Pacific Railroad Company, the issues joined in that action by the complainant, answer and instructions of the court, the verdict, judgment and satisfaction of judgment were presented by affidavit (T.R. 8-22).

SUMMARY

Defendant-Appellee herein contends that the judgment and satisfaction of judgment in case No. 3341 against Union Pacific Railroad Company is a bar to any proceedings against this defendant-appellee.

The issue to be determined is whether the appellant may have his damages again judicially determined after having had a judicial determination against one of two joint tort feasors, which determination was against a solvent defendant and which determination was paid and satisfaction of judgment entered of record.

ARGUMENT

I

SATISFACTION OF JUDGMENT RAISES CONCLUSIVE PRESUMPTION THAT CLAIMANT HAS BEEN PAID IN FULL.

We commence with the preface that: (1) One wronged can recover only once for one wrong; (2) Joint tort feasors may be separately or jointly liable for the whole of the wrong; but, (3) Recovery may be obtained only once against joint tort feasors. This necessarily follows for although the courts are ardent in their endeavor to direct that one recover full compensation for an injury, they are as zealous in directing that tort feasors shall not be compelled to pay twice for the same wrong.

And, satisfaction of a judgment obtained against one of the two or more joint tort feasors operates as a satisfaction against all. This follows, as it must be presumed that satisfaction of the judgment would not have been entered by the claimant unless or until payment had been made in full, and in Adams v. Southern Pacific Company, 204 Cal. 63, 266 Pac.

541, the California Court, quoting in turn from Tompkins v. Clay Street Railroad Company, 66 Cal. 163, 4 Pac. 1165, said that this presumption is conclusive (emphasis supplied):

> "Every party contributing to the injuries of plaintiff was liable to the full extent of the damages by her sustained. Her injuries gave her but a single cause of action. If she had brought a separate action against the Sutter Street Company, and recovered a judgment therein, and such judgment had been satisfied, she could not subsequently have maintained another action for the same injuries against the Clay Street Company, *inasmuch as the conclusive presumption would be that she had already received full compensation for all damages by her sustained.* Damages resulting from the same wrongful transaction are ordinarily inseparable; she could not recover part from one and part from the other defendant. * * * It is to be observed, when the bar accrues in favor of some of the wrongdoers, by reason of what has been received from or done in respect to one or more of the others, *that the bar arises not from any particular form that the proceeding assumes, but from the fact that the injured party has actually received satisfaction, or what in law is deemed the equivalent.*"

The Supreme Court of Washington in Abb v. Northern Pac. Ry. Co., 28 Wash. 428, 68 Pac. 954, held likewise when it said (emphasis supplied):

> "... The release was held to be a bar to an action

for the same injuries against the other company. The opinion says: 'The court below held very properly that this agreement and release was a bar to a recovery in this action. The plaintiff had received one satisfaction. He was not entitled to a second.' In Turner v. Hitchcock, 20 Iowa, 310, 317, 318, Mr. Justice Dillon, in a well-considered opinion, says upon this subject: 'It is also an undisputed principle of the common law that, as a general rule, the release of one joint wrongdoer releases all. The rule and the reason for it are thus stated in a work of high authority: "If divers commit a trespass, though this be joint or several, at the election of him to whom the wrong is done, yet if he releases to one of them, all are discharged, because his own deed shall be taken most strong against himself." Also (which seems to be the better reason) such release is a satisfaction in law which is equal to a satisfaction in fact. Bacon's Abr. tit. 'Release,' B. * * * "The reason of the rule" that the release of one is the release of all "seems," says Bronson, J., with his accustomed clearness and force ([Bronson v. Fitzhugh] 1 Hill, 185, supra), "*to be that the release being taken most strongly against the releasor is conclusive evidence that he has been satisfied for the wrong; and after satisfaction, although it moved from only one of the tort feasors*, no foundation remains for an action against any one. A sufficient atonement having been made for the trespass, the whole matter is at an end. It is as though the wrong had never been done." ' In

Railroad Co. v. Sullivan (Colo. Sup.) 41 Pac. 501, it was held that, where two railroad companies were jointly liable for injury to a person, a release by such person of his right of action against one of the companies also released the other. The following cases are also directly to the same point, and strongly support the same rule: Tompkins v. Railroad Co., 66 Cal. 163, 4 Pac. 1165; Goss v. Ellison, 136 Mass. 503; Donaldson v. Carmichael (Ga.) 29 S. E. 135."

The above-cited California and Washington cases are the forerunners in those states and have been cited and followed in numerous cases in many jurisdictions.

The Supreme Court of New Hampshire in Colby v. Walker, 86 N.H. 568, 171 A. 774, recognized not only that the giving of a release raises a presumption that it is in exchange for full payment, but also held that satisfaction of a judgment is a complete discharge:

"It appears to be the rule established by several decisions that if there is nothing in the release from which a different intent may be inferred, the conclusion that it was given in exchange for full compensation for the damages to which it relates follows as a matter of law.

The declaration that compensation is of controlling importance is supplemented by the rule that a general release imparts such compensation.

***

The judgments which were entered in the suits against Wilson stand somewhat differently. It is the law here that a judgment on the merits against one liable for a tort, followed by satisfaction, works a discharge of others similarly liable for the same injury. Zebnik v. Rozmus, 81 N.H. 45, 124 A. 460. Although the judgments here involved were entered by agreement, they were judgments concerning the merits of the case, and are of the same virtue as though rendered upon verdicts of juries. ***

On the record as it stands, Walker would be discharged by the satisfied judgments against Wilson and the ruling of the Superior Court was correct."

II

ACCORD AND SATISFACTION

The Court of Appeals of Maryland in Lanasa v. Beggs, 159 Md. 311, 151 A. 21, reviewed at length authorities holding that where a complete release or satisfaction of claim is given to one joint tort feasor, it is actually accord and satisfaction and operates as a full and complete satisfaction to all of the joint tort feasors. The court said in part:

"* * *Although the rule in this jurisdiction is that the injured party may bring separate suits against the wrongdoers, and proceed to judgment in each, and that no bar arises as to any of them until satisfaction is received, yet the party injured

may have but one satisfaction. So, if as a matter of fact, the wronged party has actually received satisfaction, or what in law is regarded as its equivalent, from one tort feasor, he is barred from proceeding against the other tort feasors. ***

'This court said in *** when the plaintiff has accepted satisfaction in full for the injury done him, from whatever source it may come, he is so far affected in equity and good conscience that the law will not permit him to recover again for the same injury.' And in *** 'The reason for this rule is apparent. It is neither just nor lawful that there should be more than one satisfaction for the same injury whether that injury be done by one or more.' *** In the case first cited Whitehouse, J. speaking for the Supreme Court of Maine said *** 'In either case the sufferer is entitled to but one compensation for the same injury, and full satisfaction from one will operate as a discharge of the others.' ***

This full satisfaction may assume the form of either a release, as in Gunther v. Lee, 45 Md. 60, 24 Am. Rep. 504; of an entry of settlement upon a court docket in a pending action, as in Cox v. Md. Elec. Rwys. Co., 126 Md. 300, 95 A. 43; of a payment or tender of the amount of a judgment previously recovered against a joint tort feasor, as in *** or of an accord and satisfaction, as in *** Chetwood v. California Nat. Bank, 113 Cal. 414, 45 P. 704 *** While the full satisfaction may be made by these various ways, every one has the

effect and quality of its form, and, so if the way be by release under seal, the rules applicable to specialties will prevail, but, if by parol, the rules pertaining to that form of agreement will govern.***"

In Chetwood v. California Nat. Bank, 113 Cal. 414, 45 Pac. 704, at page 707 of the Pacific Report (emphasis supplied):

" '***This claim was purely for unliquidated damages occasioned by a tort.' While plaintiff may sue one or all of joint tort feasors, and while he may maintain separate actions against them, and cause separate judgments to be entered in such actions, he can have but one satisfaction. Once paid for the injury he has suffered, by any one of the joint tort feasors, his right to proceed further against the others is at an end. Where several joint tort feasors have been sued in a single action, a retraxit of the cause of action in favor of one of them operates to release them all. The reason is quite obvious. *By his withdrawal, plaintiff announces that he has received satisfaction* for the injury complained of, and it would be injust that he should be allowed double payment for the single wrong. *It matters not either whether the payment made was in large or small amount. If it be accepted in satisfaction of the cause of action against the one, it is in law, a satisfaction of the claim against all.*"

In Kaplowitz v. Kay, 70 Fed. 2d 782, it was said:

"It is settled law that: 'The release of one joint tort feasor, or the satisfaction of a judgment against one, releases all from liability. *** 'In cases of joint torts, the injured person may sue one, or any number less than all, of the joint tort feasors, or may sue all; and, where there is one injury, there can be but one satisfaction. If the injured person executes a release to one of the joint tort feasors, it operates to bar an action against the others, for the reason that the cause of action is satisfied and no longer exists.' "

The Supreme Court of the United States in Sessions v. Johnson (1877) 95 U.S. 347, 24 L. Ed. 596, said:

"Joint wrong-doers may be sued separately; and the plaintiff may prosecute the same until the amount of the damages is ascertained by verdict, but the injured party can have only one satisfaction, the rule being that he may make his election de melioribus domnis, which, when made, is conclusive in all subsequent proceedings.***"

Thus, having made his election, and having entered of record a satisfaction of judgment such election, so says the Supreme Court of the United States, is conclusive. And in the language of the Maryland Court, Lanasa v. Beggs, supra, and the California Court, Chetwood v. California Nat. Bank, supra, is complete and full payment in accord and satisfaction. Like authority is Flynn v. Manson 19 Cal. App. 400, 126 P. 181; Pellet v. Sonotone Corporation

(Cal) 151 P.2d 912, reversed on other grounds 160 P.2d 783, and Clabaugh v. Southern Wholesale Grocers Ass'n, 181 Fed. 706.

III

INJURY BY JOINT TORT FEASORS RESULTS IN ONE CAUSE OF ACTION — ONE CAUSE OF ACTION CANNOT BE SPLIT.

In Cain v. Quannah Light and Ice Co., 131 Okl. 25, 267 Pac. 641, plaintiff recovered judgment against one joint tort feasor which judgment was satisfied, but "The judgment, however, contained the provision that 'the same should be without prejudice to plaintiff's rights against the Quannah Light and Ice Company." The court, after citing numerous authority, first recognized the rule that:

> " 'The general theory expressed in the foregoing cases finds support in a practically uniform line of authorities holding that the acceptance of satisfaction of judgment against one of two or more joint tort feasors is a bar to any further proceedings against the other tort feasors, except for costs.' "

Then, as to plaintiff's contention in the Cain case that "a partial satisfaction of a joint judgment by one judgment debtor and a release from further liability as to such judgment debtor will not operate as a bar as to other judgment debtors," the court continued:

"***In the cases cited by plaintiff, the claims were not reduced to judgment, and settlement and release were made prior to judgment; there was no settlement of the cause of action.

It must be borne in mind that there was but one cause of action and, while the plaintiff might have proceeded separately against all and recovered judgment against all, yet there could be but one satisfaction."

Which is to say that if appellant herein, McPherson, had recovered judgments in separate suits against Union Pacific Railroad and this appellee, Amalgamated Sugar Co., the satisfaction of the judgment against one would satisfy the other which is according to reason. Then commenting on plaintiff's claim, in the Cain case, that it was not her intention to release the joint tort feasor the Oklahoma court said:

"But it is argued that the defendant did not intend to recover her full damages in her former suit against the gypsum company, that the judgment rendered was an agreed judgment *** a compromise *** without prejudice to the rights of the plaintiff as against this defendant, and the judgment so provides.

"The answer is: The question here involved is not a question of her intention; it is a question of her legal right to split her cause of action, to apportion her damage and to recover by separate actions separate portions thereof. Plaintiff had

but one cause of action. This cause of action, of course, existed against all wrongdoers, but it was a single cause of action and when suit was filed *** and such claim rendered to judgment, the cause of action then merged in the judgment, and the satisfaction of the judgment was a satisfaction and settlement of the cause of action.

"The plaintiff having no legal right to split her cause of action, the court by its judgment could legally grant such right, if, in fact, it so intended. It must be borne in mind that it is not the rendition of the judgment that operates as a bar, but it is the satisfaction thereof. If the court by its judgment intended to reserve to the plaintiff the right to proceed against this defendant, after full and complete satisfaction of the judgment, this portion of the judgment would be inoperative as beyond the power of the court to render.***"

The reasoning in the Cain case is particularly applicable in the present case. Plaintiff had but one cause of action. Plaintiff sued the railroad company and recovered a judgment by a verdict of the jury as to the amount plaintiff was entitled to. That judgment has been satisfied, and in the words of the Oklahoma Court, the satisfaction was a satisfaction not only of the judgment, but "of the cause of action."

Cain v. Quannah Light and Ice Co. is cited with approval by the Utah Court in Dawsen v. Board of Education, etc., 118 Ut. 452, 222 P.2d 590, wherein it was said in part:

"(1) A person injured by a joint tort has a single and indivisible cause of action. In the case of Green v. Lang Co., Inc., et al, Utah, 206 P.2d 626, 627, Mr. Justice Wade, speaking for this court, passed on a similar principle and announced the rule in this jurisdiction in the following language:

*"It is well established that there can be but one satisfaction for injuries sustained in one wrong.****

*"When a right of action is once satisfied it ceases to exist.****

"(2) Having a single cause of action against more than one tort feasor, an injured party may proceed against the wrongdoers either jointly or severally and he may recover judgment or judgments against one or all, but he can have but one satisfaction of the cause of action. If the cause has been satisfied in full, the injured party can proceed no further. He has recovered all the law permits."

As to the amount of the damages, the court said in effect that when the amount had been established by the jury, that amount was conclusive.

"***Any uncertainty as to the amount of his loss was made certain by the judgment and so no contention can be made that a part payment only was received. A judgment rendered against one of two or more joint tort feasors is a conclusive

determination of the measure of damages until or unless reversed upon appeal. *** He might have sought a new trial on the grounds of the inadequacy of the damages and appealed to this court from the insufficiency had he been dissatisfied with the ruling. He did not, however, choose to follow that course***."

The Utah Court in the Dawson Case also cited with approval the case of Eberle v. Sinclair Prairie Oil Co., 120 F. 2d 746, 749, 135 A.L.R. 1494. In that case, plaintiff and two of the joint tort feasors entered into a compromise and settlement, the plaintiff reserving her right to proceed against the other tort feasors, and obtained the approval of the compromise and settlement by the District Court of Seminole County, Oklahoma. The United States Circuit Court of Appeals, 10th Circuit, said:

"***The effect of the settlement and compromise of the causes of action, the receipt of the sum stipulated, the judgment approving the compromise of the causes of action and dismissing the action with prejudice was an extinguishment of the two single causes of action. The causes of action having been extinguished, the district court of Seminole County, Oklahoma, was powerless to reserve the right in the administratrix to prosecute another suit on the same causes of action against Sinclair and Gray."

Similar and conclusive authority is Viehweg v. Mountain States Tel. and Tel. Co., 141 Fed. Supp.

848, decided by Judge Taylor in 1956; City of Wetunka v. Cromwell Franklin Oil Co., 171 Okl. 565, 43 P.2d 434, and Sykes v. Wright, 201 Okl. 346, 205 P.2d 1156 where the "judgment and determination by the court was followed in the journal entry by a reservation to plaintiff of the right to proceed by action against J. G. Wright and his insurance carrier."

The court said that:

> "***The judgment entered in this case was upon the merits and issues joined by the pleadings. The judgment determined the amount all persons dependent on the deceased were damaged. This extinguishes the cause of action and no justicable claim against others jointly and severally liable for the tort remains."

IV

CLAIMANT IS ESTOPPED FROM FURTHER ACTION AFTER JUDGMENT IS OBTAINED AGAINST A SOLVENT JUDGMENT DEBTOR

In McNamara v. Chapman, 81 N.H. 169, 123 A. 229, 31 A.L.R. 188, it was held that where a prior judgment had been obtained against a solvent master for the tort of the servant, that such prior judgment was a bar to a later action taken against the servant even though the prior judgment had not been satisfied. On this point the court said:

> "The plaintiff has had a full and complete fair trial of his claim for compensation, resulting in

a judgment in his favor, which the defendant is ready and willing to pay. Unless there is some positive rule of law which forbids, this ought to be the end of the case. If the rule that in the case of joint wrongdoers the plaintiff may severally pursue one after another to judgment, refusing to accepted tendered payment of the earlier judgment. (McDonald v. Nugen, 118 Iowa 513, 96 Am. St. Rep. 407, 92 N.W. 675; Blann v. Crocheron, 20 Ala. 320), is the law in this state, it ought not to be extended. It should not be applied to cases not clearly falling within its scope, nor when its application will impose an elsewhere unheard of liability."

Judicial cognizance may surely be taken of the solvency of the Union Pacific Railroad in relation to a judgment in the amount of $35,600.00. It would be against good reason and unconscionable that one injured could have his day in court, receive a judgment based upon the verdict of a jury against a defendant entirely solvent and able to pay, and then by the waiver of a part of costs or interest subject others to retrial on the same issues.

Although the New Hampshire court stated that master and servant were not joint tort feasors, that should not be the rule in this jurisdiction (Judd v. Oregon Shortline Railway, 4 F. Supp. 657) and the McNamara case should be authority that when one elects to submit the question of damages to the trior, he is barred by the decision of that trior.

V

WAIVER OF INTEREST—CONSIDERATION FOR SATISFACTION

Plaintiff, in this action, contends that he did not collect all of the interest due him. This does not appear from the satisfaction. It is only after further evidence of actual date of payment and by mathematical computation that such can be determined. Plaintiff also contends that the interest is a legal incident of the judgment. With this we are inclined not to disagree, for we think, the satisfaction of judgment satisfied all "incidents" thereof. Repeating from Chetwood v. California Nat. Bank, supra:

> "***It matters not either whether the payment made was in large or small amounts. If it be accepted in satisfaction of the cause of action against the one, it is in law, a satisfaction of the claim against all."

We disagree, however, with appellant's statement (Brief, page 4) under appellant's statement of the case that Judge Taylor held that the interest was not a part of the judgment. Judge Taylor said (Tr. 23), and rightly so, that "It may be that in accepting payment of this judgment the plaintiff reduced the interest that had accumulated to date of judgment, but he nevertheless fully satisfied the judgment and received full payment for the damages awarded by the jury."

And the statement made by Judge Taylor, is not without precedent. In Stibbin et al v. Fried, Crosby and Co., 185 Minn. 336, 241 N.W. 315, the Minnesota Court held that by entry of satisfaction of judgment the judgment creditor waived costs and interest:

> "***The two judgments have been paid in full, except for an item of $2 and interest thereon, arising from a charge of a fee of $1 on each of the two executions issued. (No levy appears to have been made.) But the judgments were satisfied pursuant to stipulation of counsel. They were discharged of record, and that ended all further obligation of plaintiffs as judgment debtors. The terms imposed were for the benefit of defendant. It was within its power to waive them or any part therein. It appears conclusively, we think, that it waived payment of the paltry $2 in question. In any event, the executions were made exactly nothing by the satisfaction of the judgments. They thereby became, and now remain, without force or effect of any kind.***"

The judgment in the instant case of damages, costs and interest were all for appellant's benefit in the Railroad Case. If he chose to waive costs, or to waive interests, or any part of either, it still remains that as to the Railroad Company the judgment was completely satisfied.

Nor is there merit to appellant's argument that the judgment was paid by the Railroad Company,

and not by this appellee. The same question was presented in Abb v. Northern Pac. Ry. Co., supra, and in Lesoski v. Anderson, 112 Mt. 112, 112 P.2d 1055, where it was held:

> "Plaintiff urges that no consideration moved from these defendants to the plaintiff, and that these defendants were not parties to the release. The only effect of such a showing would be to indicate that plaintiff did not intend to release them. *** In view of the theory upon which release of one joint feasor releases the other, that is, the claim has been fully satisfied, it is not necessary that any consideration move from the other feasor to the claimant.***"

VI

APPELLANT'S AUTHORITY AND COVENANT NOT TO SUE — DISTINGUISHABLE FROM THE FACTS OF THIS CASE.

In the first action, Case No. 3341, the action against the railroad company, the appellant in this action executed, under seal, to the railroad company, the joint tort feasor, a full and complete satisfaction of judgment (Tr. 20-21), and thereby released and extinguished any cause of action he had against that joint tort feasor.

But appellant contends that he has a right to now maintain another action against a separate joint tort feasor, and further contends that the payment

of judgment by the railroad company only operates to reduce pro tanto the liability of the separate joint tort feasor. Apparently appellant attempts to treat the satisfaction of judgment as a covenant not to sue.

The pro tanto payment doctrine comes into play only in the case of a covenant not to sue based upon a partial payment. There is a vast difference in the legal effect between a compromise partial settlement, or a covenant not to sue, on one hand, and a release, or a satisfaction of the claim, or what in law is equivalent to full payment, on the other hand. In the former it is only a partial payment, and the separate joint tort feasor cannot object because his liability is pro tanto lessened. But in the latter, the cause of action is extinguished.

In distinguishing between a release and a covenant not to sue, the Supreme Court of Tennessee, in Byrd v. Croucher, 166 Tenn. 215, 60 S.W.2d. 171, clearly stated the rule to be:

> "The first of these cases adheres to the common-law rule that the cause of action against joint tort feasors is indivisible, and that a release of one operates to release all. The reason for excluding a mere covenant not to sue from this rule was stated to be that the covenant does not 'have the effect, technically, of extinguishing any part of the cause of action.'
>
> This theory was observed in the second of the two cited cases, wherein this court held that a

covenant not to sue does not extinguish the cause of action; is not a defense to a suit on such cause of action; nor a satisfaction of the claim for damages; and may be pleaded by the covenantee only 'by way of set-off or recoupment.'

It is obvious, therefore, that the covenant before us contains an element not consistent with the nature of a mere covenant not to sue, in the stipulation that it 'may be pleaded as a defense to any action' which may be brought against the covenantee on the cause of action treated in the covenant.

Such a stipulation operates clearly to extinguish the cause of action which the plaintiff had against the covenantee. It expressly sets up and establishes a bar to the prosecution of any action which the plaintiff may bring in breach of her covenant, and was therefore intended as a satisfaction of such cause of action. The instrument was, therefore, in effect a release and not a mere covenant not to sue."

In Davis v. Buckeye Light & Power, 145 O.S. 172, 61 N.E.2d 90, a release was made without any reservation as to other tort feasors. The court recognized its earlier decisions to the effect:

"***Yet, 'where such written releases expressly provide that the release is solely and exclusively for the benefit of the parties thereto and expressly reserves a right of action as against any

other wrongdoer, such reservation is legal and available to the parties thereto.' "

However, the court said that there can only be one satisfaction, and a complete release of one tort feasor releases all tort feasors. Therefore, unless the reservation is clear, a presumption arises that the payment received was in full satisfaction (emphasis supplied):

"Although, under the facts disclosed by the record in the instant case, the amount to be awarded in full satisfaction of the damages sustained had not been ascertained in a trial and announced in a jury's verdict, the contract of settlement and release entered into contained no reservation or exception whatever. Again we recur to the opinion in the Adams Express Co. case for the statement of the principle which we feel particularly applicable here. It is as follows:

'If, however, the language of the release is unqualified and absolute in its terms, it may be fairly said that a presumption does arise that the injury has been fully satisfied, because the parties would not be presumed to split the redress into fractional parts. But such a presumption cannot arise where the very terms of the release are squarely to the contrary:

It is to be observed that the terms of the release under consideration by the court in that case were "squarely to the contrary" for it "particularly specified that such satisfaction was not to operate

as a satisfaction for the other defendants."

That the settlement was only in partial satisfaction could easily have been shown by other appropriate language.' "

We repeat, it is only where partial payment is made, and accepted as such, and where a covenant not to sue, as distinguished from a release, is given that the doctrine that the payment made by a joint tort feasor only operates to release pro tanto the liability of other joint tort feasors comes into play. Beedle v. Carolan 115 Mt. 587, 148 P.2d 559; Richardson v. Pacific Power & Light Co., 11 Wash. 2d 288, 118 P.2d 985; Haney v. Cheatham, 8 Wash. 2d 310, 111 P.2d 1003; McWhirter v. Otis Elevator Co., 40 F. Supp. 11; Black v. Martin, 88 Mt. 256, 292 P. 577; Lesoski v. Anderson, 112 Mt. 112, 112 P.2d 1055, wherein the rule was tersely stated as:

"***There is but one injury, for which each tort feasor is answerable in full, but, there being but one wrongful act, there can be but one full recovery, one complete satisfaction. When that is obtained the injured party has exhausted his remedy.***

Recently the courts have held that the release of one tort feasor does not necessary release the others. If from the language of the release it appears that it is not intended as full satisfaction of the claim arising out of the tort it does not have that effect, but the rule is that to save the right of recourse against the other feasors, the

release must be in the nature of a covenant not to sue or there must be words in the release which show that it is not in full satisfaction of the claim and that he does not thereby discharge the others from liability."

A general release by itself imparting consideration, (Colby v. Walker, supra), and the presumption being that it was given in consideration of full payment, it is incumbent upon the one executing the release to expressly reserve his right of recourse, if he intends such a reservation. But whether the instrument does, in law, reserve such right, or whether such a right can, in law, because of the nature of the instrument, be reserved is a matter for the court to determine. Cain v. Quannah Light and Ice Co., supra; Eberle v. Sinclair Prairie Oil Co., supra; Viehweg v. Mountain States Tel. and Tel. Co., supra; Clabaugh v. Southern Wholesale Grocers Ass'n, 181 Fed. 706.

In Pellet v. Sonotone (Cal.) 151 P.2d 912, the court said that:

"In classifying such an agreement, we may, so far as it affects joint tort feasors, look to its consideration, its effect and the circumstances attending its execution. We cannot accept the recitals of the parties to the agreement as a conclusive determination of its character."

In Jenkins v. Southern Pac. Co., 17 F. Supp. 820 (reversal on other grounds in (1938; CAA 9th) 96 F.2d 405, affirmed in (1939) 305 U. S. 534, 83 L. Ed. 334, 59 S.Ct. 347) it was held:

"A mere covenant not to sue, which does not contain words amounting to a release of the cause of action, or which negatives such release, is not effective for the purpose of releasing other joint tort feasors *** (citing cases).

The question, therefore, in this as in every case, is whether the particular instrument was one of release, or merely a covenant not to sue."

The court reviewed many cases on the subject, analyzed in detail the instrument concerned, in that case, then as to the construction of the instrument, held:

"An instrument must be given the effect it bears on its face. It is true (as was the case***) that when an instrument states specifically that it is a covenant not to sue, the court cannot interpret it in any other way, *and read into it words of release.* But the converse is also true, that is, if the instrument shows on its face that it is, in truth, a release of a particular claim, and the claim is identified, it amounts to a general release of the cause of action, although the word 'release' is not actually used. Here three other verbs are used which, actually, achieve a release, to-wit, *refrain from instituting, pressing or in any way aiding.* And this release is intended to affect any other cause of action which may exist from the beginning of the world until the present time.

It is evident that when this is the result aimed at, the mere fact that the parties entitle an in-

strument of settlement a 'covenant not to sue' means nothing. The instrument must be given the effect it bears ***.

To give such instrument, under such circumstances, the effect of a mere covenant not to sue would be allowing form to take the place of substance, and words the place of acts."

It is to be noticed in the case at bar that there was no attempt to reserve any right in the settlement of the case against the Railroad Company, neither is there any covenant not to sue, but there is a full and complete satisfaction of judgment; a direct and complete release made after judgment rendered.

Thus, Appellee here is in a much stronger position than Eberle v. Sinclair Prarie Oil Co., supra, and Cain v. Quannah Light & Ice Co., supra, wherein the judgments attempted to reserve a right against other tort feasors, and Dawson v. Board of Education, Etc., supra, wherein the satisfaction recited that there was no intention of satisfying or releasing any claim against the other joint tort feasor.

The difference between the case at bar and the authority cited by Appellant was recognized by the 10th Circuit Court of Appeals in Eberle v. Sinclair Oil Co., supra, when it said:

"***The administratrix might have entered into a compromise with McGeorge, dismissed her action against it, released McGeorge or covenant-

ed not to sue McGeorge and reserved her right to sue Sinclair and Gray.

Instead of following that course the administratrix elected to enter into the contract compromising and settling her two single causes of action, received the sum stipulated in satisfaction thereof, and submitted the compromise to the court for its approval. The court by its judgment approved the compromise and settlement and dismissed the action with prejudice. The judgment had the same effect as though it had been entered in favor of the administratrix for the stipulated amount and had then been satisfied upon payment of that amount ***."

Referring then to Appellant's authorities Lovejoy v. Murray, appellant's brief page 8, is a case wherein plaintiff recovered judgment for about $6,000.00 against one joint tort feasor, upon which he received payment of about $800.00. The court said that the issue was: "Is the judgment, or the judgment and part payment in that case, a bar to this action?". The court merely held that the part payment *was not a satisfaction*, but did recognize that a satisfaction of one judgment is a bar to subsequent actions, saying:

"2. That no matter how many judgments may be obtained for the same trespass, or what the varying amounts of those judgments, the acceptance of satisfaction of any one of them by the

plaintiff is a satisfaction of all the others, except the costs, and is a bar to any other action for the same cause."

In Young v. Anderson, Appellant's brief page 9, the parties were not joint tort feasors. The actions were upon separate causes, and the instrument was considered as a covenant not to sue. 33 Idaho at page 524, 196 P. at page 194, the court said:

> "The document is to be construed as a release, having the effect of an agreement not to sue, and not as an acknowledgement of satisfaction for the injuries received. The Boise Valley Traction Company was not in any sense a joint tort feasor with defendant. The release, therefore, was not a bar to the counterclaim against respondent.***"

Although Huskey Refining Co. v. Barnes, page 9 of appellant's brief, held that the payment by one "operates to reduce pro tanto the amount recoverable by the other," that case, like Young v. Anderson, concerned independent tort feasors, and it was not determined whether or not the instrument was a release or a covenant not to sue. At page 716, 119 Fed. 2d, the opinion states:

> "Some time after the accident an instrument denominated a 'covenant not to sue' was executed by Barnes administratrix***.
>
> We think it unnecessary to consider whether the contract is a release; for the purpose of the decision we may assume that it is. But plainly

appellant and the railroad company were not joint tort feasors***.

"Between appellant and the railroad there was no concert of action, common design or duty, joint enterprise, or other relationship such as would make them joint tort feasors. ***where the independent tortious acts of two persons combine to produce an injury indivisible in its nature, either tort feasor may be held for the entire damage—not because he is responsible for the act of the other, but because his act is regarded in law as a cause of the injury. *** In the case of such independent concerning torts the release of one wrongdoer does not release the other. Young v. Anderson, supra, and cases there cited."

Again, in the Huskey case, it was a partial payment made upon a disputed unliquidated claim not reduced to judgment.

In Friday v. United States, appellant's brief page 10-11, a partial payment had been made without any determination of the full amount of damages. Again, this action concerned independent tort feasors, the instrument expressly reserving a right of action against "any other tort feasor, upon whom and against whom a liability may be predicated by reason of (a) independent negligence of, (b) acts by, or (c) liability on the part of said other tort feasor or tort feasors causing or contributing to the damage," and the court said that:

"It is also apparent that the above release does not purport to be a payment for all the injuries

suffered by ***."

and (emphasis supplied):

> "*** It is as imperative that the tort claimant shall receive full compensation, as it is that the tort feasors shall not pay twice or more than the *full* award, *determined judicially or otherwise*, as a unit or piecemeal."

In the case at bar this award was determined judicially in the action against the Railroad Company.

While the court in the Friday case stated that it was impressed that the dicta in the two Idaho cases (Young v. Anderson and Valles v. Union Pacific Railroad) actually stated the law in Idaho, that statement by the court was made in regard to the particular facts on hand, where only a partial settlement had been made and rights clearly reserved in the nature of a covenant not to sue.

And the court in Garvin v. Osterham, appellant's brief page 12, recognized that a release or a satisfaction given to one joint tort feasor releases all others. The court said:

> "There is no question but what under Oklahoma Law that a judgment on the merits entered and satisfied as to one of several joint tort feasors serves to bar any future action against the remaining tort feasors ***. This rule finds root in the concept that there can be only one recovery for any one wrong and an attempt to prosecute a claim against remaining tort feasor defendants

after judgment and satisfaction as to other joint tort feasors is an attempt to split a cause of action.

However, in the instant cases, the judgments entered by the court dismissing two of the alleged joint tort feasors were not judgments on the merits wherein settlement agreements were approved by the court and incorporated into final judgments in favor of plaintiff, but were judgments sustaining plaintiff's motion to dismiss, without regard to the merits, and which technically amounted to judgments in favor of the dismissed defendants and not the plaintiffs."

We think that appellant's authorities, which are that where a partial settlement is made, and rights reserved under an agreement in the nature of a covenant not to sue, the partial settlement being made as to unliquidated damages prior to judicial determination, are not authority as to the facts in this case.

Likewise, authority cited by appellant for what appellant terms the "full compensation rule," do not support such a statement in relation to the facts at hand. The cases cited by appellant recognize (appellant's brief, page 14) that there must be full satisfaction or

"that which the law must consider as such ***."

Or, as stated in many of the cases, that appellant has received satisfaction "or what in law is deemed the equivalent."

VII

MOTION TO DISMISS

The District Court in the instant case did consider and treat the motion as one in summary judgment, and in that respect Martin v. Broadcase Music, Inc., 248 F.2d 530, does not appear to be in point.

In this case, Judge Taylor, (Tr. 22) in his order, stated that "defendant's Motion will be treated as one for summary judgment," and (Tr. 25) "accordingly, it is ordered that the Motion of defendant be, and the same is hereby granted."

In the judgment (Tr. 25) it is recited that:

> "The above matter coming on before me on Defendant's Motion for Summary Judgment *** it is the determination of this court that the motion for summary judgment is well taken, and the defendant is entitled to a judgment of dismissal."

Respectfully submitted,

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Due service and receipt of 3 copies of Appellee brief admitted this ____ day of July, 1959.

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